In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1293

DANIEL L. EDWARDS, JR., PETITIONER

v.

THOMAS C. REED, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In April 1962, after 19 years of federal service, petitioner was discharged from his civilian job as a GS-12 Missile Inspector at the Air Force Logistics Command, Wright-Patterson Air Force Base, because of unsatisfactory performance of his duties. Petitioner was later employed by the Air Force as a WG-2 Janitor but was removed from that position in December 1971.

In 1969, petitioner complained to the Air Force that his 1962 discharge was based on religious discrimination. The Civil Service Commission's Board of Appeals and Review (BAR) affirmed the Air Force's determination

that petitioner's complaint was untimely and not in compliance with applicable procedures (C.A. App. 1-5).[1]

Petitioner thereafter filed additional administrative complaints alleging discrimination by Air Force personnel on the basis of his race, religion, and national origin. After an investigation and a formal hearing, the Air Force rejected the complaints, finding that the evidence did not support petitioner's allegations of discrimination. In September 1972, the BAR sustained the Air Force decision (C.A. App. 6-11).

Petitioner had, in the meantime, filed six additional complaints alleging that Air Force personnel were engaged in a conspiracy to deny him reemployment because of his race, religion, and national origin. The Air Force rejected each of the complaints on the ground that the evidence did not support petitioner's allegations of discrimination. On February 7, 1973, the BAR again sustained the Air Force decision (C.A. App. 12-20), finding that "[t]here is no evidence of record that complainant has been treated any differently than other employees would have been treated under the same circumstances" (*id.* at 19).

In January 1973, while petitioner's third appeal was pending before the BAR, he filed yet another administrative complaint reiterating the allegations of previous

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[1] "C.A. App." refers to the appendix to the government's brief in the court of appeals, a copy of the relevant portions of which we are lodging with the Clerk of this Court.

We are also lodging the following documents, to which we refer later in this memorandum: (1) Letter dated May 4, 1973, from Civil Service Commission, Board of Appeals and Review, to petitioner. (2) Letter dated June 14, 1973, from petitioner to the district court. (3) Order of the district court filed July 12, 1973. (4) Letter dated August 11, 1973, from petitioner to the district court. (5) Affidavit of petitioner dated May 24, 1973, filed in the district court on August 13, 1973. (6) Petitioner's formal complaint, filed September 20, 1973.

complaints. The Air Force rejected the new complaint on the ground that its allegations had already been considered and rejected in the previous Air Force decision. The BAR affirmed on May 4, 1973, finding that petitioner's allegations were identical to those made in prior complaints and that the allegations were for that reason properly rejected by the Air Force under 5 C.F.R. 713.215.

2. Petitioner claims that he received the BAR's letter of May 4, 1973, on May 17, 1973 (Pet. 3). On June 15, 1973, he filed a letter in the United States District Court for the Southern District of Ohio requesting that his "case be heard by your court with waiver of court fees" and that an attorney be appointed to represent him. The letter attached the BAR's May 1973 decision.

On July 12, 1973, the district court denied the application for waiver of court costs "inasmuch as petitioner is now employed and able to retain private counsel * * *."

On August 13, 1973, petitioner filed another letter in the district court stating his intention to proceed without waiver of costs. Attached to the letter was a ten-page affidavit reciting numerous allegations of discrimination relating to petitioner's 1962 discharge, his subsequent efforts to obtain reemployment, and the Air Force's processing of his various discrimination complaints (of which, he alleged, there were more than 108 (p. 3)). The affidavit concluded by requesting that the court "review and act on all of my written discrimination complaints" (p. 10). Petitioner asked to be reinstated with back pay (*ibid.*).

On September 20, 1973, petitioner filed a formal complaint, signed by counsel, in which he alleged that his 1962 and 1971 discharges from Air Force civilian employment were based on "religious and racial prejudice" (p. 2). The complaint sought reinstatement for petitioner in the

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GS-12 position he held in 1962, together with back pay and other entitlements (p. 5). It also sought, pending a hearing on that request, reinstatement to the janitor position from which petitioner was discharged in 1971 (*ibid.*).

3. The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 10-14). The court of appeals affirmed, holding that the complaint was not filed within the 30-day period allowed by 42 U.S.C. (Supp. IV) 2000e-16(c) (Pet. App. 6-7).

4. Petitioner argues that his first letter, seeking waiver of costs and appointment of counsel, "satisfied the thirty day statutory limit for filing a civil action under Title VII" (Pet. 4). That contention rests on the premise—apparently accepted, at least *arguendo*, by both courts below—that the 30-day period commenced when petitioner received the BAR's letter of May 4, 1973, affirming the Air Force's rejection, on *res judicata* grounds, of his most recent discrimination complaint.

But petitioner's complaint in the district court was "primarily directed at events which transpired in 1962 and the relief sought would involve reinstatement to the GS-12 position which plaintiff held at that time" (Pet. App. 13). His challenge was not to the propriety of the BAR's application of *res judicata* principles in its May 1973 decision but rather to the correctness of its February 1973 decision on the merits of his discrimination claims. The 30-day period within which to file a civil action to review the February decision commenced when petitioner received notice of that decision.

Petitioner does not claim, and the record does not suggest, that his letter of June 15, 1973, requesting waiver of costs, was filed within 30 days after he received notice of the February BAR decision. Consequently, even if the

filing of the letter of June 15, 1973, commenced a "civil action" within the meaning of the statute, the present action was not timely commenced. The judgment of the court of appeals is therefore correct, and further review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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